

A Magudar bin Ambit v Rambilin bt Ambit & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO S-01-190-04 OF 2012

B AZAHAR MOHAMED, LINTON ALBERT AND DAVID WONG JJCA
29 JANUARY 2014

C *Native Law and Custom — Land dispute — Customary rights over land — Appeal against decision of Director of Lands and Survey Department — Whether respondent entitled to NCR on land — Whether DLS had failed to give respondent opportunity to submit on whether land was state land — Whether there was breach of rules of natural justice — Whether it could be inferred from words of SLO that NCR had been extinguished since 1930*

D Rambilin bte Ambit ('the respondent'), a Sabah native, claimed native customary rights (NCR) over a piece of land situated in the District of Pitas ('the land'). According to the respondent, she and her family had occupied and cultivated the land since her marriage. The respondent applied to the Assistant Collector of Land Revenue, Pitas ('the ACLR') to formalise her occupation of the land. However, in December 1996, the respondent was forcibly dispossessed of the land by one Ruddy bin Awah ('Ruddy'). The respondent commenced a legal suit against Rudy to recover her land. Although the ACLR held a land enquiry to determine the respondent's claim for NCR on the land, no decision was delivered for some two years. The respondent thus commenced a judicial review (JR) application to compel the ACLR to deliver his decision. In the meantime, the Director of Lands and Surveys, Sabah ('the DLS') had alienated the land to Ruddy and another party. This in turn had prompted the respondent to commence a second JR application to set aside the decision of the DLS. In short the respondent commenced three legal suits and two JRs to protect her rights. In their defence both Ruddy and the state government had averred that the respondent's occupation of the land had not conferred any NCR on her because the land was then state land and any entry into state land had to be with the consent of the state. In December 2006 all three suits and JR actions were adjudicated together by the High Court, which ordered, inter alia, that the respondent was entitled to possession of the land and that Ruddy or his agents had to vacate the land. In respect of the JR actions the High Court judge (the High Court judge at first instance) ordered, inter alia, that the ACLR should deliver his decision in respect of the land enquiry application within 90 days; that the alienation of the land was unlawful, null and void; and that the decision of the DLS to alienate the land ought to be quashed. The ACLR and DLS appealed against the orders made in respect of the JR proceedings but the Court of Appeal dismissed the appeal. Ruddy's appeal was also dismissed by the Court of Appeal, which affirmed the decision of the High Court. In

compliance with the High Court directive, the ACLR delivered its land enquiry decision wherein it rejected the respondent's claim for NCR. The respondent appealed to the DLS as provided in the Sabah Land Ordinance ('the SLO'). After many delays the DLS dismissed the respondent's appeal thereby prompting the respondent to appeal to the High Court. The High Court judge ('the trial judge') concluded that the DLS was wrong in deciding the appeal on a ground which was contrary to the agreed fact that the land was 'state land'. Hence the trial judge found that there had been a breach of natural justice depriving the respondent of the opportunity to submit on that issue. The trial judge also found that based on the respondent's affidavit evidence, which had not been rebutted by the opposing party, the DLS should have decided in favour of the respondent. As such, the trial judge concluded the respondent had established NCR on the land and allowed her appeal. The present appeal was against that decision. The appellant in the present appeal was not a party to the land enquiry held by the ACLR and the appeal by the DLS but had a pending land application for the land before the ACLR. The main grounds of appeal were that the High Court judge had erred in his findings that the DLS was wrong in finding that the land was not state land and that there was no opposing affidavit to the respondent's assertion that she had NCR on the land; and by his failure to consider that the SLO prohibited NCR post 1930.

Held, dismissing the appeal with no order as to costs:

- (1) The High Court judge at first instance had held that the land was in fact state land. As such, there was no reason to depart from this undisputed fact. The DLS could not depart from what had been agreed and found by the ACLR during the land enquiry hearing without giving the respondent the chance to submit on that issue prior to his decision. The principles of fairness and natural justice applied with full force to all proceedings before the courts or administrative tribunals. Further, the hearing by the DLS was in the nature of an appeal and any departure from the undisputed fact before the ACLR should be justified with strong grounds and parties ought to be given every opportunity to submit as to why it was or was not justified. In the present case, the DLS had blatantly not complied with the rules of natural justice (see para 29).
- (2) There was no reason to depart from the trial judge's finding that there was no opposing affidavit to the respondent's assertion that she had NCR as it was correct in law. In any event, there had been a finding of fact by the High Court judge at first instance that the respondent had established her claim of NCR on the land (see para 30).
- (3) Although the trial judge had erred in his failure to consider whether NCR could exist post 1930, this issue had been considered by the High Court judge at first instance. After examining in great details the history and

- A land laws in Sabah, the High Court judge at first instance had concluded that there was no clear and unambiguous intention inferred from the words of the SLO that NCR had been extinguished since 1930. In fact after construing the SLO as a whole he had rightly found that there was clear intention in the statute that NCR continued to subsist after 1930.
- B The words 'still held' in s 88 of the SLO did not refer to 1930 but to the time of registration of the land by the DLS. Further, s 88 of the SLO is to be found in Part V of the SLO which deals with 'Registration' of lands. Hence it could be safely inferred that s 88 did not deal with the creation of NCR. Section 88 of the SLO ought to be interpreted in the context of
- C the whole ordinance and not by itself. In the circumstances there was no merit in the appellant's contention that NCR could not be created after 1930 (see paras 36–37).

[Bahasa Malaysia summary]

- D Rambilin bte Ambit ('responden'), anak negeri Sabah, menuntut hak adat anak negeri ('HAAN') ke atas sebidang tanah terletak di Daerah Pitas ('tanah tersebut'). Menurut responden, dia dan keluarganya telah menduduki dan mengusahakan tanah tersebut sejak perkahwinannya. Responden memohon Penolong Pengutip Hasil Tanah, Pitas ('PPHT') untuk mengesahkan penghuniannya ke atas tanah tersebut. Walau bagaimanapun, pada bulan
- E Disember 1996, tanah tersebut telah dirampas secara paksa daripada responden oleh Ruddy bin Awah ('Ruddy'). Responden telah memulakan guaman sah terhadap Ruddy untuk mendapat balik tanah tersebut. Walaupun PPHT memutuskan satu siasatan tanah untuk menentukan tuntutan
- F responden terhadap HAAN ke atas tanah tersebut, tiada keputusan telah dibuat selama lebih kurang dua tahun. Responden oleh itu telah memulakan permohonan semakan kehakiman ('SK') untuk mendesak PPHT membuat keputusannya. Sementara itu, Pengarah Tanah dan Juru Ukur, Sabah ('PTJ') telah memberi milik tanah tersebut kepada Ruddy dan pihak satu lagi. Ini
- G seterusnya telah mendorong responden untuk memulakan permohonan SK kedua untuk mengetepikan keputusan PTJ. Pendek kata responden telah memulakan tiga guaman sah dan dua SK untuk melindungi hak-haknya. Dalam pembelaan mereka kedua-dua Ruddy dan kerajaan negeri telah menegaskan bahawa penghunian responden atas tanah tersebut tidak
- H memberikan apa-apa HAAN kepadanya kerana tanah tersebut pada masa itu adalah tanah kerajaan dan apa-apa kemasukan ke atas tanah kerajaan hendaklah dengan persetujuan kerajaan negeri. Pada bulan Disember 2006 kesemua tiga guaman dan tindakan-tindakan SK itu telah diadili bersama oleh Mahkamah Tinggi, yang telah mengarahkan, antara lain, bahawa responden
- I berhak mendapat milikan tanah tersebut dan bahawa Ruddy atau ejen-ejennya hendaklah mengosongkan tanah tersebut. Berhubung tindakan-tindakan SK itu hakim Mahkamah Tinggi (hakim Mahkamah Tinggi perbicaraan permulaan) telah memerintahkan, antara lain, bahawa PPHT hendaklah menyampaikan keputusannya berhubung permohonan siasatan tanah tersebut

dalam tempoh 90 hari; bahawa pemberi hak milikan tanah itu menyalahi undang-undang, terbatal dan tidak sah; dan bahawa keputusan PTJ untuk memberi hakmilik tanah tersebut patut dibatalkan. PPHT dan PTJ telah memohon terhadap perintah-perintah yang dibuat berkaitan prosiding SK tetapi Mahkamah Rayuan telah menolak rayuan itu. Rayuan Ruddy juga telah ditolak oleh Mahkamah Rayuan, yang mengesahkan keputusan Mahkamah Tinggi. Selaras dengan arahan Mahkamah Tinggi, PPHT telah menyampaikan keputusan siasatan tanahnya yang mana ia telah menolak tuntutan responden untuk PPHT. Responden telah merayu kepada PTJ sebagaimana diperuntukkan dalam Ordinan Tanah Sabah ('OTS'). Selepas banyak penangguhan PTJ telah menolak rayuan responden yang mendorong responden merayu ke Mahkamah Tinggi. Hakim Mahkamah Tinggi ('hakim perbicaraan') memutuskan bahawa PTJ salah dalam memutuskan rayuan atas alasan yang bertentangan dengan fakta yang telah dipersetujui bahawa tanah tersebut adalah 'tanah kerajaan'. Justeru hakim perbicaraan itu mendapati bahawa terdapat pelanggaran keadilan asasi yang menafikan responden peluang untuk berhujah isu tersebut. Hakim perbicaraan juga mendapati bahawa berdasarkan keterangan affidavit responden, yang tidak dipatahkan oleh pihak pembangkang, PTJ patut telah membuat keputusan menyebelahi responden. Oleh itu, hakim perbicaraan memutuskan responden telah membuktikan PPHT ke atas tanah tersebut dan membenarkan rayuannya. Rayuan ini adalah terhadap keputusan tersebut. Perayu dalam rayuan ini bukan pihak kepada siasatan tanah yang diputuskan oleh PPHT dan rayuan oleh PTJ tetapi mempunyai permohonan tanah ke atas tanah tersebut yang belum selesai di hadapan PPHT. Alasan-alasan rayuan utama adalah hakim Mahkamah Tinggi terkhilaf dalam dapatannya bahawa PTJ salah dalam memutuskan yang tanah itu bukan tanah kerajaan dan bahawa tiada affidavit bantahan terhadap hujah responden bahawa dia mempunyai PPHT ke atas tanah tersebut; dan oleh kegagalannya untuk mengambil kira bahawa OTS melarang HAAN selepas tahun 1930.

Diputuskan, menolak rayuan tanpa perintah untuk kos:

- (1) Hakim Mahkamah Tinggi perbicaraan permulaan telah memutuskan bahawa tanah tersebut sebenarnya tanah kerajaan. Oleh itu, tiada sebab untuk menyimpang daripada fakta yang tidak dipertikaikan ini. PTJ tidak boleh menyimpang daripada apa yang telah dipersetujui dan didapati oleh PPHT semasa perbicaraan siasatan tanah tersebut tanpa memberikan responden peluang mengemukakan isu tersebut sebelum keputusannya. Prinsip-prinsip keadilan dan keadilan asasi terpakai sepenuhnya untuk semua prosiding di hadapan mahkamah atau tribunal-tribunal pentadbiran. Bahkan, perbicaraan oleh PTJ bersifat rayuan dan apa-apa penyimpangan daripada fakta yang tidak dipertikaikan di hadapan PPHT hendaklah wajar dengan alasan-alasan kukuh dan pihak-pihak sepatutnya diberikan setiap peluang untuk

- A mengemukakan kenapa ia adalah atau tidak wajar. Dalam kes ini, PTJ jelas tidak mematuhi rukun keadilan asasi (lihat perenggan 29).
- (2) Tiada sebab untuk menyimpang daripada penemuan hakim perbicaraan bahawa tidak terdapat afidavit bantahan terhadap hujah responden bahawa dia mempunyai HAAN kerana ia adalah betul dari segi undang-undang. Walau bagaimanapun, terdapat penemuan fakta oleh hakim Mahkamah Tinggi perbicaraan permulaan bahawa responden telah membuktikan tuntutan HAANnya ke atas tanah tersebut (lihat perenggan 30).
- B
- C (3) Walaupun hakim perbicaraan terkhilaf kerana gagal mengambil kira sama ada HAAN boleh wujud selepas tahun 1930, isu ini telah diambil kira oleh hakim Mahkamah Tinggi perbicaraan permulaan. Selepas memeriksa dengan teliti sejarah dan undang-undang tanah Sabah, hakim Mahkamah Tinggi perbicaraan permulaan memutuskan bahawa tiada
- D niat jelas atau tidak taksa yang diberikan berdasarkan perkataan-perkataan OTS bahawa HAAN telah terhapus sejak 1930. Bahkan setelah mentafsirkan OTS secara keseluruhan beliau dengan betul mendapati bahawa terdapat niat jelas dalam statut bahawa HAAN berterusan wujud selepas 1930. Perkataan-perkataan 'still held' dalam
- E s 88 OTS tidak merujuk kepada 1930 tetapi kepada masa pendaftaran tanah tersebut oleh PTJ. Selanjutnya, s 88 OTS didapati di Bahagian V OTS berkenaan 'Registration' tanah. Justeru adalah selamat untuk membuat inferens bahawa s 88 tidak membincangkan kewujudan HAAN. Seksyen 88 OTS patut ditafsirkan dalam konteks keseluruhan
- F ordinan dan bukan secara sendiri. Dalam keadaan itu tiada merit dalam hujah perayu bahawa HAAN tidak boleh wujud selepas tahun 1930 (lihat perenggan 36–37).]

Notes

- G For cases on customary rights over land, see 10 *Mallal's Digest* (4th Ed, 2013 Reissue) paras 691–725.

Cases referred to

- H *PP v Tan Tatt Eek & Other Appeals* [2005] 2 MLJ 685, FC (refd)
Shim Tshun Fatt v Public Prosecutor [2001] 5 MLJ 40, HC (refd)

Legislation referred to

Sabah Land Ordinance ss 13, 14, 15, 16, 88
 Sarawak Land Code (Cap 81)

I

Appeal from: Civil Trial No BKI-25–1/1 of 2012 (High Court, Kota Kinabalu)

Chan Wai Ling (WL Chan & Assoc) for the appellant.

Kong Hong Ming (Lee & Kong) for the respondent.

A

David Wong JCA (delivering judgment of the court):

[1] This is an appeal by the appellant against the decision of the High Court in which the learned judge dismissed the appeal arising from the decision of the Director of Lands and Survey Department, Sabah where the respondent's claim for native customary rights to a piece of land measuring 15 acres situate at Kampung Salimpodon in the District of Pitas ('the land') was rejected.

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[2] On 24 January 2014, we heard the appeal and after giving due consideration to the evidence adduced in the trial court and submissions by respective counsel, we dismissed the appeal. We now give our grounds for that decision.

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BACKGROUND FACTS

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[3] The respondent ('Rambilin') is a Sabah native Dusun Kimaragan and had since her marriage she and her family occupied and cultivated on the land. Her family occupation is premised on the purchase of the land from two natives, namely Sharif Osman bin Sharif Murah and Sharif Endun bin Sharif Ading in 1982. To formalise her occupation, she made an application to the third respondent ('ACLR') for the land under PT No 89280296.

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[4] Rambilin's occupation on the land came to an abrupt end in December 1996 when she was forcibly dispossessed by one Ruddy bin Awah ('Ruddy') who entered the land without consent and demolished her house and destroyed the crops on the land.

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[5] To recover her land back from Ruddy, Rambilin commenced a legal suit under K22-71 of 2000 (suit K71).

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[6] In 2002, a land enquiry was held by ACLR, Pitas to determine Rambilin's claim for native customary rights on the land and her application for the ownership of the land via PT No 89280296. That enquiry is Land Enquiry 3 of 2000.

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[7] No decision was delivered by the ACLR for some two years after the hearing of the enquiry. Hence Rambilin instructed her solicitors to commence a judicial review application via JR-K25-02 of 2002 ('JR1') to compel the ACLR to deliver his decision.

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[8] Pending the disposal of JR1, the second respondent ('the director') alienated the land to Ruddy and another party which compelled her to take

A another judicial review application via JR-K24–240 of 2002 ('JR2') to set aside the decision of alienation of the land. Ruddy and the other owner of the land then transferred the land to Ruddy's wife.

B [9] To recap, Rambilin had started three legal suits, two judicial reviews and one civil suit to protect her rights. In December 2006, these three suits were adjudicated together in High Court, Kota Kinabalu and on 9 July 2007, Ian Chin J made the following orders:

- C** (1) The plaintiff (Rambilin) is entitled to possession and/or to recover possession of the land;
- (2) The defendant (Ruddy) whether by himself or his servants or agents do forthwith vacate the land, and forthwith deliver possession of the land to the plaintiff;
- D** (3) Ruddy whether by himself or his servants or agents or otherwise howsoever from being or remaining on or entering or using the land upon and subsequent to the delivery of possession of the land to the Rambilin;
- (4) Ruddy pay the Rambilin mesne profit at the rate of RM500.00 per month from the 31st of December 1996 until possession of the land is delivered up to Rambilin;
- E** (5) Ruddy pay to Rambilin special damages of RM66,500.00 and statutory interest of 8%pa thereon from 31st of December 1996 until the date of judgment;
- F** (6) Ruddy pay the Rambilin RM 10,000.00 being exemplary and aggravated damages;
- (7) Ruddy pay Rambilin interest of 8%pa on the adjudged sums under prayers (4) and (6) from the date of judgment to the date of full payment;and
- G** (8) and Ruddy pay costs to Rambilin to be taxed.

[10] As for the two judicial review actions, the learned judge ordered as follows:

- H** (1) The ACLR shall within 90 days hereof deliver his decision in Land Enquiry No LE3/2000 in respect of land application Nos 89230296 and 96230318;
- (2) It is declared that the alienation of the land by Native Title No 233105729 and Native Title No 233105710 (which encompass 'the land') is unlawful, null and void;
- I** (3) The decision of the director to alienate the land constituted by Native Title No 233105729 and Native Title 233105710 is hereby quashed;
- (4) The decision of the ACLR and registrar of titles to register Native Title No 233105729 and Native Title 233105710 is hereby quashed, and;

- (5) The director, the ACLR and the registrar of titles and all officers acting under them shall be prohibited from further processing land application No 96230318, land application No 97230158 and land application No 9620350 until after the final determination of Land Enquiry No LE3 3/2000 and Rambilin's land application No 89230296; **A**
- (6) Costs to Rambilin. **B**

[11] The judgment of Ian Chin J was affirmed by Court of Appeal on 28 October 2010 when it dismissed the appeal of the director and ACLR in respect of the judicial review proceedings in JR1 and JR2. As for the appeal by Ruddy in suit K71, it was dismissed by the Court of Appeal on 15 December 2010. Leave to appeal to the Federal Court for the three appeals was dismissed on a technical ground. **C**

[12] In compliance to the Justice Ian Chin's direction, the ACLR on 5 November 2007 delivered his decision in Land Enquiry 3 of 2000 wherein Rambilin's claim for native customary rights was rejected and hence the land application as well. Rambilin on 9 November 2007 appealed to the Director of Lands and Survey Department as provided in the Sabah Land Ordinance against the decision of the ACLR — Land Enquiry No 47/2007. **D**

[13] That appeal to the director was heard on 14 August 2007 but regrettably no decision on that appeal was forthcoming for more than 32 months. This unacceptable delay prompted Rambilin again to start another judicial review application to compel the director to deliver his decision. That judicial review is JR K-25-2 of 2011 dated 6 January 2011. Leave was granted by the High Court on 8 March 2011 to compel the director to deliver his decision. **E**

[14] Rambilin was then informed by the State Attorney Chambers that the deputy director who heard the appeal had since retired and was given an undertaking by the aforesaid chambers that a fresh land enquiry will be reconvened in the near future. Based on that undertaking, that judicial review was withdrawn. **F**

[15] That undertaking was complied with when an enquiry was conducted on 24 March 2011 by another deputy director but again no decision was delivered within a reasonable time. Again another judicial review was commenced on 14 December 2011 under JR KK-25—2 of 2011 fixed for hearing on 23 December 2011. However on 20 December 2011, the director delivered his decision dismissing the appeal. **G**

[16] Rambilin then by way of this notice of originating motion appealed against the decision of the Director to High Court, Kota Kinabalu on 6 January 2012 and the same was fixed for hearing on 16 February 2012. Decision was **H**

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A delivered by the learned judge within a matter of some 30 days on 22 March 2012 where he allowed the appeal and found that Rambilin had established native customary rights on the land.

B [17] This present appeal is in respect of the decision of High Court dated 22 March 2012.

C [18] At this juncture we should mention that at the start of this appeal, we were informed by respective counsel that the appellant was actually not a party in the land enquiry held by the ACLR and the appeal hearing by the director in Land Enquiry No 47/2007. He was brought into this notice of originating motion as the counsel for Rambilin found out that the appellant has a pending land application for the land before the ACLR. We were also informed that the second and third respondents did not partake in the proceedings in the High Court and had informed the court that they will abide by whatever decisions of the courts. With that we now move to our deliberation of this appeal.

DECISION OF THE HIGH COURT

E [19] The learned judge's reasoning can be summarised on two grounds and they are these. Firstly the director was wrong in deciding the appeal on a ground which was contrary to an agreed fact that the land is 'state land'. Hence the learned judge found that there has been a breach of natural justice depriving the Rambilin the opportunity to submit on that issue.

F [20] The second ground can be seen in this paragraph of the learned judge's judgment:

G On the affidavit evidence be him the Director shuld have decided in favour of the Plaintiff because Plaintiff's assertion in her affidavit in support dated 20.3.2000 and in her further affidavit in support affirmed on 16.3.2011 that she has NCR over the land was not challenged at all by the 1st Defendant. In this regard it is familiar law that in the absence of rebuttal, material assertions in the affidavit of the opposing party are deemed to be admitted. *Ng Hee Thoong & Others v Public Bank Bhd* [1995] 1 MLJ 281.

GROUND OF APPEAL

I [21] Learned counsel raised six grounds of appeal and having heard to her submissions, those grounds can be encapsulated into three main grounds as follows:

- (a) the learned judge was wrong to find that the director was wrong in finding that the land is not state land despite the fact that it was not an issue before the ACLR;

- (b) the learned judge was wrong to find that there was no opposing affidavit to the assertion of Rambilin that she has native customary rights on the land; and A
- (c) the learned judge was wrong when he did not consider the learned counsel's contention that the Sabah Land Ordinance prohibits native customary rights post 1930. B

[22] In view of the historical background set out above, the starting point of our deliberation is the judgment of Ian Chin J in suit K71, JR1 and JR2. C

[23] To recap, in suit K71 Rambilin had claimed repossession of the land from Ruddy, who had dispossessed her from the land. In November 2001, Ruddy was also granted title deeds to the land resulting in a judicial review of that decision. D

[24] Ruddy and the state government had claimed the sale and purchase agreement in which Rambilin bought her land was null and void on the ground that the land was then state land and that the subsequent occupation by Rambilin did not confer her any right whatsoever to the land. This contention is premised on any entry into state land must be with the consent of the state. E

[25] Ian Chin J went through in great details the historical background of the Sabah Land Ordinance with specific reference to the customs and laws of the natives relating to land, starting when the charter was granted by the British government on 1 November 1881 to the British North Borneo Co to take over the grants of lands to British North Borneo Provisional Association Ltd by the Sultan of Brunei and the Sultan of Sulu and to rule over the inhabitants in those lands. F

[26] Two issues confronted Ian Chin J and they are as follows: G

- (a) whether native customary rights still subsists under the Sabah Land Ordinance? H
- (b) whether consent from the state authority is required for natives to enter state land to establish native customary rights? I

[27] In respect of the two issues, Ian Chin J said as follows:
The definition of 'customary tenure' was replaced by one under s 65 (with the original text of s 4 of the 1913 Land Rules reproduced in black and with strikethrough to show the omitted text while the additions are shown in red), viz: I

65. 'Customary tenure' means the lawful possession of land by natives either by continuous residential occupation or cultivation for 3 or more

A consecutive years or by title under this Part of under the Poll Tax Ordinance, or Part IV of the Land Ordinance, 1913.

B The same argument was advanced that by the insertion of the term 'lawful' to the definition, it was intended that no native can enter upon any state land without the permission of the state to claim native right. Such an interpretation can at most by only implied and the implication can be other than that was urged. The term could also mean that the possession of the land by a native was not the result of unlawfully driving out another native from that land to claim possession. If it was intended by that amendment or definition that native customary right could only come into existence after 1930 if there was prior permission by the government to enter the land, then it failed miserably as the law requires that the words used or the intention must be plain and unambiguous (*Adong bin Kuwau & Ors v The Government of Johore* [1997] 1 MLJ 418; [1998] 2 MLJ 158; *Nor ak Nyawai & Ors v Borneo Pulp Plantation Sdn Bhd & Ors* [2001] 2 CLJ 769; *Kerajaan Negeri & Ors v Sagong bin Tasi & Anor* [2005] 6 MLJ 289. If it was the intention, then nothing was easier than to simply state that as from that date no new native customary rights can be created unless the entry to the land was with the permission of the state.

D This means that native customary rights which included the right to enter state land for the purpose of establishing it still subsists until today. If it was intended to abolish such right from ever arising again then a simple legislation or amendment to the law in the terms I have just mentioned would do it. The government could, under ss 80–85, carry out a complete settlement exercise, which the colonists failed to do so, covering not isolated area but the whole of Sabah to settle all the claims to native customary rights once and for all. This would be another way of preventing future native customary rights claims from arising after the settlement if that is what the government really wants. The colonists were reminded of their obligation in these terms (No S159 — Instructions passed under the Royal Sign Manual and Signet to the Governor and Commander-in-Chief of the Colony of North Borneo. Dated 9 October 1950):

G 23. The Governor is, to the utmost of his power, to ensure that the fullest regard is paid to the religions and existing rights and customs of the inhabitants of the Colony, to promote education among them, and by all lawful means to protect them in their persons and in the free enjoyment of their possessions and to prevent all violence and injustice against them.

H Now that the natives in Sabah have their own legislators who are in a position to decide their future and are no longer under the colonists, the native legislators can easily decide whether to put an end to native customary rights or to continue with them, in the ways I have just mentioned. As it is, there is no need for a native to seek permission from the government to enter state land for the purpose of establishing native customary rights since such rights were exercised from time immemorial without having to seek permission first from anyone. This means that occupation of the land by Rambilin was not unlawful within the meaning of s 6(1) of the Land Ordinance 1930. Does this not mean, it may be asked, that a native can enter any land in Sabah and then attempt to establish a claim to native customary rights? Yes, it does but the government could easily immediately proclaim the whole un-alienated land in Sabah for settlement since after all some of the claim to be

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successful must have been in existence for three years prior to the date of the settlement.

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[28] With such clarity, there is no necessity for us to add or paraphrase what Ian Chin J said except to now deal with the grounds listed earlier.

B

Ground 1 — Director's finding that the land is not state land

[29] We see no reason to depart from what the learned judge held for the simple reason that it was undisputed and found by Ian Chin J that the land is in fact state land. The director in our view cannot depart what had been agreed and found by the ACLR during the land enquiry hearing without giving Rambilin the chance to submit on that issue prior to his decision. The principle of fairness and natural justice applies with full force to all legal proceedings, be it in the courts or administrative tribunals. Furthermore, the hearing by the director is in a nature of an appeal and any departure from the undisputed fact before the ACLR must be justified with strong grounds and parties must be given every opportunities to submit as to why it is or is not justified. And when so justified, the respondent must also be given a chance to submit on the implication. This was blatantly not done by the director.

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D

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Ground 2 — No opposing affidavit to Rambilin's assertion that he had native customary rights

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[30] Again there is no reason to depart from the learned judge's view as it is correct in law. In any event, there has been a finding of fact by Ian Chin J in suit K71 that Rambilin had established her claim of native customary rights on the land.

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Ground 3 — Failure to address the contention that native customary rights cannot exist post 1930

[31] Firstly we agree with learned counsel for the appellant that the learned judge was wrong in not addressing this submission despite the fact it was not raised in the ACLR hearing. We say so for the reason that what was being raised before the director at the appellate level was one of pure legal construction of a provision of a statute, namely s 88 of the Sabah Land Ordinance .

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[32] Learned counsel for the appellant on this ground adopts her submission made at High Court. As her submission is novel, we see it fit to reproduce the relevant part in full.

I

Our argument is further supported by section 88 of Part V of the Land Ordinance

A which reads:

No new title and no dealing with, claim to or interest in any land except land *still held* under native customary tenure without documentary title shall be valid until it has been registered in accordance with the provisions of this Part.

B Section 88 must be referring to the existing NCR or customary tenure because of the word 'still'. This is the only exception — 'except land still held'. For the exception to apply the NCR must be existing at the time the Land Ordinance came into force. The exception does not cover fresh NCR as there will not be any lawful occupation of state land after the commencement of the Land Ordinance.

C For the reasons above I concur with the opinion of the State Attorney General published in our local newspapers on 10.2.2012 whereby he said that no fresh NCR can be created after the Land Ordinance came into force. The learned State Attorney General must have a basis to say that no jurisdiction in this world recognises fresh NCR.

D Distinction must be drawn between existing NCR (existing in December 1930) and fresh NCR. Angry comments were hurled towards the State Attorney General after his statement was published due to a lack of understanding and the failure to differences between these two types of NCR.

E Those claiming NCR must show that their NCR existed prior to the commencement of the Land Ordinance. In fact our argument on NCR is the same position currently held in Sarawak. (see the case of *Madelis* which we will refer to below).

F To admit fresh NCR will go against the principles of torrens system which our land law is modeled. Any other interpretation will be met with inconsistencies within the four walls of the Land Ordinance.

G In respect of s 15 of the Land Ordinance, it must be read in the proper context and not to be read in isolation. Section 15 is a guideline provided for the Collector in determining NCR as it is not the intention of the legislature at that time. Considering all the relevant sections in the Land Ordinance we can only arrive at one conclusion, namely: No person can lawfully occupy state land after the commencement of this Ordinance. Thereafter no fresh NCR can be created after 13.12.1930.

H [33] The law on construction of statute is clear and it is this. In construing any statute, the first task is to look at the words in the legislation and apply the plain meaning of the words in the statute and if there is no ambiguity to the words used, the court is duty bound to accept it even if it may lead to mischief. The rationale is simple. The court's duty is not to legislate, that duty lies with the Parliament. If however the words used are not clear, then the court may adopt the purposive approach in construing the meaning of the words used (see *Public Prosecutor v Tan Tatt Eek & Other Appeals* [2005] 2 MLJ 685). Another principle of interpretation of statute is that the impugned section should be viewed as a whole. That is to say that in interpreting the impugned sections it must be done with reference to the context and other sections of the statute, so

as to make the whole statute consistent (see *Shim Tshun Fatt v Public Prosecutor* [2001] 5 MLJ 40). A

[34] We have with great care perused the judgment of Ian Chin J in Suit K71 where he, after examining in great details the history of the land laws in Sabah, concluded that there is no clear and unambiguous intention inferred from the words of the Sabah Land Ordinance that native customary rights have been extinguished since 1930. In fact he had found that there are clear intention in the statute that native customary rights continue to subsist after 1930. He had in our view construe the Sabah Land Ordinance in the appropriate manner in that he examined the historical aspect and the statue as a whole. B C

[35] Learned counsel also referred to the Sarawak Land Code to advance her contention. With respect, we find no merit in such comparison as that statute expressed its intention clearly and we can do no better than reproduce the relevant section: D

Native customary rights

5(1) As from the 1st day of January, 1958, native customary rights may be created in accordance with the native customary law of the community or communities concerned by any of the methods specified in subsection (2), if a permit is obtained under section 10, upon Interior Area Land. Save as aforesaid, but without prejudice to the provisions hereinafter contained in respect of Native Communal Reserves and rights of way, *no recognition shall be given to any native customary rights over any land in Sarawak created after the 1st day of January, 1958*, and if the land is State land any person in occupation thereof shall be deemed to be in unlawful occupation of State land and section 209 shall apply thereto. E F

(2) The methods by which native customary rights may be created are — G

- (a) the felling of virgin jungle and the occupation of the land thereby cleared;
 - (b) the planting of land with fruit trees;
 - (c) the occupation or cultivation of land; H
 - (d) the use of land for a burial ground or shrine; or
 - (e) the use of land of any class for rights of way. I
- Provided that —

- (i) until a document of title has been issued in respect thereof, such land shall continue to be State land and any native lawfully in occupation thereof shall be deemed to hold by licence from the Government and shall not be required to pay any rent in respect thereof unless and until a document of title is issued to him; and

- A** (ii) the question whether any such right has been created or has been lost or terminated shall, save in so far as this Code makes contrary provision, be determined by the law in force immediately prior to the 1st day of January, 1958.
- B** (3) Whenever any dispute shall arise as to whether any native customary rights exists or subsists over any State land, it shall be presumed until the contrary is proved, that such State land is free of and not encumbered by any such rights.
- C** (4) Any native customary rights lawfully created under subsection (1) or (2) may be terminated and the State land over which such rights have been created, shall be resumed by the Government and compensation shall be paid to any person lawfully having such rights, in accordance with Part IV
- D** [36] As for the s 88, Ian Chin J had in fact dealt with it in his judgment and this is what he said:
- Section 88 was cited as preventing Rambilin from acquiring any interest in the land as to be able to assert possession to support her action. That section reads:
- E**
- 88 No new title and no dealing with, claim to or interest in any land except land still held under customary tenure without documentary title shall be valid until it has been registered in accordance with the provisions of this Part.
- F** As that clearly says, it does not prevent dealings under customary tenure. Therefore, Rambilin was not prevented by that section from being able to acquire the customary tenure and had acquired that customary tenure. Section 66 provides for customary tenure to be heritable and transferable and hence Osman and Endun had lawfully transferred the land to Rambilin.
- G**
- H** [37] As for the existence of the words 'still held' in s 88, we are of the view that those words do not refer to 1930 but to the time of registration of the land by the director. One must not lose sight of the fact that s 88 is found in Part V of the Sabah Land Ordinance which concerns with 'Registration' of lands. Hence it can be safely inferred that s 88 does not deal with the creation of native customary rights. That part of the Sabah Land Ordinance is found in Part 1 — ss 13, 14, 15 and 16 where they set out as to how native customary rights can be created under the regime of the Sabah Law Ordinance. As stated by us earlier,
- I** s 88 must be interpreted in the context of the whole Ordinance and not by itself. We also wish to state that if the Legislature had wanted to make its intention clear, it can be easily done by simply employing the same wordings as that in the Sarawak Land Code. As there are no such clear words, we cannot accede to the contention of the appellant.

[38] Hence, we find no merit in the submission of learned counsel for the appellant that native customary rights cannot be created after 1930. A

CONCLUSION

[39] For reasons stated above, we dismissed the appeal. As for costs, we made no order as the appellant was made a party to this originating motion by the first respondent for reasons stated earlier in our judgment. B

Appeal dismissed with no order as to costs. C
Reported by Kohila Nesan

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